DATE: April 28, 1995

CASE NO.: 94-INA-00134

In the Matter of:

ARTEPASTA,
Employer

On Behalf of:

LUIS LLIGUICHUZHCA,
Alien

Appearance: Ira Ehrlich, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 29, 1993, Artepasta ("Employer") filed an application for labor certification to enable Luis Lliguichuzhca ("Alien") to fill the position of Cook (AF 42). The job duties for the position are:

> Subject will be responsible for preparation and cooking of various dishes and will perform the following duteis [sic]: Planning menus, must be able to prepare such specialties as Veal Marsala, Veal Capriocossa, Salmone Alla Griglia, Pollo Paillard, Calamari Fritt, Pastas such as Linguine Pescatore, Pettuccine Con tre Fungh and Rigatona con Ricotta e Melanzane.
>
> The sole requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on August 12, 1993 (AF 45-48), proposing to deny certification on the grounds that the Employer rejected two U.S. applicants, Henry Mercado and Mark D'Abundo, for other than lawful, job-related reasons. The CO states that the Employer rejected Mr. Mercado because it tried unsuccessfully to reach him by telephone, and should have tried to reach this applicant by other means, such as certified mail. The CO also states that the Employer rejected Mr. D'Abundo after being told by the applicant's father that he is no longer available because he is employed. The CO found this reason to be unacceptable as reliance on information provided by a third party is not considered to be good-faith recruitment; it is the Employer's responsibility to contact U.S. applicants directly.

Accordingly, the Employer was notified that it had until September 16, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, received August 31, 1993 (AF 49-51), the Employer contended that the two U.S. applicants were rejected for lawful, job-related reasons. The Employer again stated that it tried to contact Mr. D'Abundo but was unsuccessful due to the fact that this applicant's father stated that he is employed and no longer available. The Employer stated that it called Mr. Mercado and left messages for him on his answering machine on several occasions but never heard back from him.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on September 2, 1993 (AF 52-54), denying certification. The CO found that the Employer's rejection of U.S. applicant Henry Mercado cannot be regarded as arising from lawful, job-related reasons as relying solely on messages left on an answering machine is not considered part of good-faith recruitment. The CO also found that the Employer's rejection of U.S. applicant Mark D'Abundo cannot be considered part of good-faith recruitment as it is the Employer's responsibility to contact U.S. applicants directly, telephonically or by means such as certified mail. Therefore, the CO found that the Employer rejected both U.S. applicants for other than lawful, job-related reasons.

On September 21, 1993, the Employer requested review of the Denial of Labor Certification (AF 55-61). On December 7, 1993, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

The Employer submitted a brief on January 31, 1994.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.20(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

At issue here is whether the Employer made a good-faith effort to contact two U.S. applicants.

The evidence of record indicates that there were two U.S. applicants for the position, Henry Mercado and Mark D'Abundo. In a letter to the Department of Labor dated March 25, 1993, the Employer stated that Mr. Mercado is "never available," that messages have been left on his answering machine, "but he has not returned our calls" (AF 27). In a letter to the Department of Labor dated July 20, 1993, the Employer stated that it telephoned Mr. D'Abundo's number, and spoke to his father who informed them that his son is not available because he is presently employed (AF 37). The Employer offers no other documentation to support its efforts to contact these two U.S. applicants other than subsequent statements in the Rebuttal and Request for Review that it made multiple attempts at contact by telephone (AF 50-51, 60).

With regards to Mr. D'Abundo, contact with a third party, even if that third party is a spouse or other family member, is not a reasonable effort to contact a U.S. applicant. *Dove Homes, Inc.*, 87-INA-680 (May 25, 1988) (*en banc*). See also, *British Body Craft*, 88-INA-439 (June 6, 1989). With regards to both U.S. applicants, the Board has repeatedly held that reasonable efforts to contact qualified U.S. applicants may require more than a single type of attempted contact. *Diana Mock*, 88-INA-255 (Apr. 9, 1990); *Any Phototype, Inc.*, 90-INA-63 (May 22, 1991); *Divinia M. Encina*, 93-INA-220 (Jun. 15, 1994). Considering the Employer's problems contacting the applicants by phone, it reasonably should have tried to contact them by certified letter. See *Gambino's Restaurant*, 90-INA-320 (Sept. 17, 1991); *G.C.M. Iron Works, Inc.*, 91-INA-81 (May 27, 1992); *Mr. and Mrs. Jay Desjardins*, 93-INA-26 (Jan. 24, 1994). Even if the applicants did not respond to the certified letter, the Employer would at least have documentation of its efforts to contact them. The record indicates that the Employer had the addresses of the applicants, and Employer's Counsel was familiar with the process of certified mail, as certified mail was used to document timely responses to the Department of Labor. Moreover, since there were only two U.S. applicants, this recruitment effort could have been taken with little effort and expense.

Under the circumstances, we find that the Employer failed to establish a good-faith effort to recruit U.S. workers. Denial for failure to recruit in good faith was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.